

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

PAUL C. FERGUSON

Appellant-Respondent

v.

R. KENNETH EWING AND DOROTHY A. EWING

Respondent-Appellants

DOCKET NUMBER WD76487 and WD76521

DATE: July 29, 2014

Appeal From:

Circuit Court of Callaway County, MO
The Honorable Carol Ann England, Judge

Appellate Judges:

Division Three
Gary D. Witt, P.J., Joseph M. Ellis, and Thomas H. Newton, JJ.

Attorneys:

George Smith, Columbia, MO

Counsel for Appellant-Respondent

Attorneys:

Thomas Riley, Fulton, MO
Jacquelyn Brazas, Fulton, MO

Counsel for Respondent-Appellant
Co-Counsel for Respondent-Appellant

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

PAUL C. FERGUSON, Appellant-Respondent, v. R. KENNETH
EWING AND DOROTHY A. EWING, Respondent-Appellants

WD76487 and WD76521

Callaway County

Before Division Three Judges: Witt, P.J., Ellis, and Newton, JJ.

Ferguson and the Ewings, adjoining landowners, failed to agree on the construction of a fence that complied with section 272.020 on the Ewings' boundary portion. Ferguson filed a petition with the circuit court for a neutral resolution, pursuant to section 272.060.1. The Ewings filed a counterclaim against Ferguson for trespass, damage to their portion of fencing, and the unlawful removal of fencing and posts from their property. The trial court appointed Householders (a committee of three disinterested individuals) to designate portions of a new fence to be constructed by each party, along with a cost estimate. The Householders determined that each party would be responsible for building and maintaining 1,880 linear feet of fencing, at a total estimated cost of \$14,602.80. After the Ewings failed to build their portion of the fence, Ferguson filed a petition with the trial court to authorize its construction. In the petition, he requested, *inter alia*, an order authorizing him to construct the Ewings' portion of a new fence at half the estimated cost and granting a judgment for the cost of construction, along with court costs and statutory Householders' fees and attorney fees.

A hearing was held, and the trial court entered judgment for Ferguson. It awarded Ferguson \$2,000 to bring the Ewings' portion of shared fencing within statutory compliance and required both parties to maintain their respective portions of fencing within compliance of section 272.110 in the future. The court assessed the \$75 Householders' fee as costs to the Ewings and denied their counterclaim, but it did not address attorney fees. Ferguson appeals, and the Ewings cross-appeal.

AFFIRMED AND REMANDED.

Division Three Holds:

This is a matter of first impression because there is no existing case law that has interpreted Missouri's fencing statutes found in Chapter 272 since they were amended in 2001. We ascertain legislative intent through a review of statutory language by its plain and ordinary meaning, and definitions of terms contained within statutes are binding on the courts.

Ferguson's appeal – Ferguson raises two points. In the first point, he argues that the trial court erred in awarding him \$2,000 to repair the existing fence when he should have been awarded \$7,301.40 (half of the Householders' estimate), as requested, to build the portion of shared fencing that the Ewings had failed to maintain, with costs constituting a lien on the Ewings' land. Chapter 272 indicates that a "lawful" fence is not necessarily a "new" fence. The remedy of equitable relief must adequately address facts and circumstances that are unique to each case. Although the amount is less than Ferguson requested, it would likely enable him to render the existing fence statutorily compliant. Thus, the trial court did not err in failing to

award half of the Householders' estimate. Point one is denied, and the award of \$2,000 is affirmed.

In the second point, Ferguson argues that the trial court erred in failing to award him attorney fees as the prevailing party. Under section 272.070, the prevailing party "shall" be awarded "court costs and reasonable attorney's fees." Thus, the trial court erred in failing to award attorney fees to Ferguson. Point two is granted.

The Ewings' cross-appeal – The Ewings raise two points. In the first point, they argue that the trial court erred in awarding Ferguson \$2,000 to repair the fence because the court, Ferguson, and the Householders failed to comply with the current version of section 272.070 and instead followed pre-2001 procedures from section 272.060. Because the Ewings failed to establish that the current requirements of section 272.060 were not followed, the trial court did not err in determining that Ferguson was authorized to repair the fence, pursuant to section 272.060. Point one is denied.

In the second point, the Ewings argue that the trial court based its determination of the apportionment of responsibility for fence repair on inaccurate boundary lines that had decreased the footage due to the sale of a portion of their land. The trial court's directive is based on current property ownership, and it clearly stipulates the segments of fencing for which each owner is responsible. Additionally, the award of \$2,000 (instead of half of the Householders' estimate for the construction of a new fence) shows that the amount of the award was not based solely on the Householders' estimate. Point two is denied.

Opinion by Thomas H. Newton, Judge

July 29, 2014

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